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September 18, 1996

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
Room 222, 1919 M Street, N.W.
MS 1170
Washington, D.C. 20554

RE: Motion for Stay of Implementation of Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98

Dear Mr. Caton:

The Iowa Utilities Board ("IUB") files the enclosed Motion for Stay in the subject proceeding. An original and six copies are enclosed; two additional copies are annotated as "Extra Public Copy."

The IUB contacted the Office of General Counsel of the Federal Communications Commission and discussed the fact that the substance of this filing will be included in a Motion for a Stay which the IUB will file on September 19, 1996 with the U.S. Court of Appeals for the Eighth Circuit in Case No. 96-3321.

Sincerely,

Richard A. Drom
Counsel for the Iowa Utilities Board

cc: William Kinard, General Counsel
Common Carrier Bureau
Janet Reno, Attorney General of the United States
International Transcription Service

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Implementation of the Local Competition Provision in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

MOTION OF THE IOWA UTILITIES BOARD FOR STAY PENDING JUDICIAL REVIEW

Comes now, Petitioner, the Iowa Utilities Board (IUB), to seek a stay of the Federal Communications Commission (FCC) First Report and Order of August 8, 1996 (Order). The IUB expressly adopts the arguments advanced by the Florida Public Service Commission in its motion for stay pending judicial review filed with the FCC on September 18, 1996. In further support of its petition, the IUB states as follows:

A. INTRODUCTION AND SUMMARY

In seeking a stay, the IUB is advancing the pro-competitive purposes of the Telecommunications Act of 1996 (1996 Act) as well as protecting a parallel pro-competitive policy of the Iowa General Assembly. The 1996 Act, recognizing the varying regulatory situations and telecommunications infrastructure needs of the states, selected state regulatory commissions as the primary tool to implement its competitive model. Iowa typifies the states that have been making steady progress of exactly the sort envisioned by the Congress. The stay is requested to avoid interference with that progress by inflexible federal rules that will undermine Iowa's progress and force it to follow national policies that the IUB

believes will deter rather than foster competition in Iowa. Thus, the stay is intended not to cause delay in achieving legitimate state and Congressional objectives, but to advance competition within our state and other states as well.

The State of Iowa acted to promote competition in the local telecommunications service arena in advance of federal actions. Iowa is at least three years into the process of introducing local service competition. The IUB issued its first certificate to a competitive local exchange service provider on December 22, 1993. The Iowa legislature established a state policy, effective July 1, 1995, of encouraging competition in the local service market. That statute contains a list of prohibited acts of an anticompetitive nature that local exchange carriers must not do and contains additional provisions necessary to create the conditions for local service competition. The state statute covers the same subject matter as the 1996 Act.

The IUB in Docket No. RMU-95-5, on April 5, 1996, adopted local service competition rules on number portability, unbundling, and cost standards. In the same order it also renoticed rules on reciprocal compensation for the termination of local calls. The rules adopted and renoticed are consistent with the 1996 Act. As required by Iowa Code § 476.101(4)"a"(1) (1995 Iowa Supp.), Iowa's two largest local exchange carriers, U S West Communications, Inc. (U S West), and GTE Midwest Incorporated (GTE), were required to file tariffs for 12 types of

unbundled essential facilities listed in the new unbundling rules. The terms of the Iowa Act are consistent with the federal Act.

Iowa's 1995 legislation also requires reasonable and nondiscriminatory access to and interconnection with essential network facilities on reasonable, cost-based, and tariffed terms and conditions. Those terms and conditions are to be no less favorable than those the local exchange company provides to itself for local exchange, access, and toll service. Iowa Code § 476.101(4)"a"(1).

Just prior to passage of the state legislation, the IUB allowed McLeod Telemanagement, Inc. (McLeod), to begin a facilities-based pilot test to provide competitive local service within Iowa. Docket No. TCU-94-4. In order to implement this decision, U S West was ordered by the IUB to file local service interconnection tariffs for review. A final IUB order, issued May 17,1996, concluded a ten-month proceeding to review U S West's local service interconnection tariffs and set a price for the local loop and interconnection services. Docket No. RPU-95-10. Many major players, including U S West, McLeod, AT&T Communications of the Midwest, Inc., GTE, and MCI Metro Access Transmission Services, Inc., participated fully in that docket. The IUB made every effort to assure that the decisions in the docket were consistent with the 1996 Act, which had become effective in the intervening period. This case is currently on appeal to the Iowa District Court in and for Polk County, Docket No.

AA-2798. In this proceeding, a ruling issued by Judge Gamble dated September 9, 1996, denied a U S West requested stay of the IUB's order.

B. CRITERIA FOR OBTAINING A STAY

The criteria for obtaining a stay are well known. They include an analysis of: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will not be harmed if the court grants the stay; and (4) the public interest in granting the stay. Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985) (citations omitted). Importantly, once a party has established that it has a reasonable likelihood of succeeding on the merits, courts employ their traditional equitable powers in assessing whether, on balance, a stay is warranted. The stronger the case as to the likelihood of success on the merits, the less powerful the showing of irreparable harm needs to be. See e.g., State of Ohio, ex rel. Celebrezze v. NRC, 812 F.2d 288, 290 (6th Cir. 1987). In determining where the balance of equities lie, courts weigh any irreparable harm to the moving party from a denial of a stay against any harm to others that may flow from a stay. In addition, they evaluate whether a stay would serve the public interest. In this instance, it is very clear that the FCC's Order cannot stand, at least with respect to the jurisdiction constitutionally left to the states, which the Order summarily changes.

1. It is very likely that the Iowa Utilities Board will succeed on the merits of its appeal.

The FCC's assertion of authority to impose comprehensive pricing regulations affecting intrastate telecommunications in its First Report and Order is expressly precluded under section 2(b) of the Communications Act of 1934 (the 1934 Act). This section states "nothing in this chapter shall be construed to apply to or to give the FCC jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications services." Section 2(b) still precludes the FCC from issuing pricing rules because the 1996 Act neither expressly modified section 2(b) of the 1934 Act nor granted the FCC additional authority. In fact, Congress deleted language that would have created a section 2(b) exception from the final bill. Section 601(c)(1) further provides the Act shall not be construed to modify, impair, or supersede federal, state, or local law unless expressly so provided.

While the 1996 Act delegated narrow specific areas of intrastate authority to the FCC, Congress reserved authority to the state commissions to make pricing decisions for interconnection, services or network elements. See sections 252(c)(1), 252(c)(2), and 252(d) of the 1996 Act. The FCC concedes it has no explicit grant of authority to make these pricing decisions. For its authority to issue rules, the FCC relies on section 251(d)(1) of the 1996

Act, which directs it to "complete all actions necessary to implement the requirements of this section" within six months. The FCC's reliance on section 251(d)(1) is misplaced for four reasons.

First, as noted above, section 251(d)(1) confers no general grant of rulemaking authority on the FCC.

Second, the FCC's interpretation of its subject matter jurisdiction conflicts with both section 2(b) of the 1934 Act and specific provisions of subsections 252(c) and (d) and 601(c)(1) of the 1996 Act.

- Congress reserved pricing authority to the states in section 2(b) of the 1934 Act. Congress's reliance on state commissions to implement the FCC's broad mandate negates the FCC's argument.

- The FCC argues it received authority in the 1996 Act to issue rules concerning certain intrastate activities. For example, the FCC argues the Act imposes federal duties, such as the obligation to allow interconnection, that necessarily affect intrastate telecommunications. However, from the fact Congress granted the FCC some narrow authority over certain intrastate matters, it does not follow that Congress intended for the FCC to occupy the entire field.

- Section 601(c)(1) provides the Act shall not be construed to modify, impair, or supercede federal, state, or local law unless expressly so provided.

Third, the Chevron implied authority principle does not apply to this case. See, Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984). Not only can the intent of Congress be discerned from the face of the statute, section 2(b) of the 1934 Act is unambiguous and straightforward. The FCC should not be permitted to rely on Chevron to strike

at the heart of the principles of the federalism doctrine, particularly in light of section 601(c)(1).

Finally, the order should be vacated because the FCC failed to follow elementary administrative procedures in refusing to notice the text of proposed rules for comment prior to adoption.. The FCC's failure is not excused by the Congressional deadline for action; there is no indication in the Act that the Administrative Procedure Act is waived for the required rules. To the contrary, their importance argues for observance, not avoidance, of the notice requirements. The failure to notice even the substance of the rules prior to adoption did not give opportunity for informed and timely comment.

2. The showing of irreparable harm if the stay is not granted is clear.

The FCC's interpretation of its subject matter jurisdiction under the 1996 Act in the First Report and Order violates states' sovereignty under the Tenth Amendment. The rules deprive states of the central role in controlling the development of communications competition as reserved to them by Congress. §§ 251(d)(3), 251(e)(3), and 252. The FCC's interpretation of the 1996 Act deprives Iowa of its sovereignty over state policies, which is the deprivation of a constitutional right. This constitutes irreparable injury per se.

It is not the passage of the Telecommunications Act which has caused Iowa harm in its attempt to foster competition. It is the FCC's prescriptive national

access and interconnection rules promulgated by the FCC that have upset three years of careful, detailed work toward competition in Iowa and constitute an unauthorized intrusion into the states' authority to oversee the detailed working of telecommunication providers in their respective states. Application of the FCC's rules will require rates for unbundled elements to exceed the cost of providing them in Iowa. Such an allegation is not just speculative, but is based on the record evidence before the IUB in Docket No. RPU-95-10. The controversy caused by the usurpation of jurisdiction by the Commission is real and immediate and can be demonstrated by two examples from Iowa's review of US West's rates..

As a part of its implementation of the Iowa competitive program, the IUB prescribed rates for new entrants to pay for use of portions of the existing telephone systems. The prescribed rate for a telephone line element called the loop when adjusted to include both intrastate and interstate costs will be $12.58. For a variety of reasons, the cost for this element was based, in part, on the Board's record showing the costs actually incurred to install the existing facilities. Section 51.505(d) of the FCC rules explicitly forbid states to consider such embedded or historic costs, requiring instead that interconnection rates be based on forward-looking costs. These rules appear to assume that use of forward-looking costs will produce lower rates than use of embedded costs. Iowa's experience in its litigated interconnection case proves the assumption false.

Thus the FCC, by overreaching its authority under an Act promising consumers the benefits of lower prices under competition, achieves the contrary result of ultimately forcing higher costs on the consumers of Iowa. It does so through the illogical method of prohibiting states from even considering embedded costs, even if those costs are lower than FCC defined forward-looking cost and even if those costs accurately reflect facilities that will be used in a forward look at the network. In a slow-growth environment, a term that fairly describes many parts of Iowa, the existing infrastructure is realistically the infrastructure of the future. It is improbable that current facilities will be replaced with newer facilities at a higher cost. This situation may be unlike Florida's, but that would not be surprising given the different growth characteristics of the two states. The fact of such differences is exactly the situation the Congress responded to by giving a primary implementation role to state agencies, and is precisely the situation ignored by the FCC's one-size-fits-all rule.

The FCC also requires geographic deaveraging for interconnection and unbundled elements. The IUB considered zone pricing in its decision to establish rates for U S West's unbundled loop and interconnection services. The IUB was not convinced deaveraging of the rates is in Iowa's public interest because of the rural nature of the state. Iowa Code § 476.95(1) states: "Communications services should be available throughout the state at just, reasonable, and affordable rates from a variety of providers." (Emphasis provided). Deaveraging

encourages competition in urban areas by lowering the cost of entry. Urban areas are already intrinsically attractive to entrants because lucrative business customers tend to be located there. However, deaveraging tends to keep competitors from looking at the rural areas because it raises the cost of entry in the rural areas. The FCC's deaveraging requirement will further discourage entry in Iowa's rural areas and reduce the rate at which competition grows in these areas. Iowa regulators know this because they are intimately involved with the situation in Iowa. Of necessity, FCC regulators do not have familiarity with the circumstances in each state.

The Telecommunications Act recognized the importance of rate averaging when pricing interexchange and interstate services at § 254(g):

> (g) INTEREXCHANGE AND INTERSTATE SERVICES. -- Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other state.

This language clearly favors rate averaging for interexchange and interstate services. The FCC's rules requiring rate deaveraging for rates for local

interconnection and unbundled elements clearly exceeds its authority and enters an area which should be left to state discretion. In this regard, the IUB would add rule 51.507(f) and § VII(B)(3) to the list of items to be stayed in the Florida motion.

The actions taken to date by the IUB to establish and foster competition in the local exchange telecommunications market are completely consistent with the national policy established in the Telecommunications Act of 1996. This strong support for competition would not be defeated by a stay of the FCC rules, for a tight timetable of arbitration actions under the Act itself would clearly continue in Iowa and its colleague states. Additionally, the depth of Iowa's pro-competition policy and, just as importantly, the changes inside its telecommunications markets require Iowa to continue in the pro-competitive direction mandated by Congress. Market changes and the 1996 Act mandate the same pro-competitive direction in all states.

3. No One Would Be Harmed by the Grant of A Stay.

Alternative local exchange carriers will not be harmed by a stay of the FCC's First Report and Order. No more uncertainty would be generated by a stay than by the fact of the underlying appeal. With a stay, incumbent local exchange carriers and alternative local exchange carriers can continue on the path toward interconnection through voluntary or arbitrated agreements.

When competitors can enter the local exchange market, customers will benefit from the resulting competition.

If no stay is granted, on the other hand, all players' business plans, investments, and modifications made to the telephone network, which allow them to operate, will be upset when the FCC's jurisdiction is reigned in. Consumers may also suffer harm if the FCC's unlawful rules allow the rates for unbundled elements to be set far above the cost of providing the elements.

4. The Public Interest Would Be Served by a Stay.

The communications industry makes up a substantial part of the domestic economy. The 1996 Act fundamentally restructures this industry, creating enormous financial and institutional risks for industry players. The FCC has clearly overstepped its authority in usurping state authority over a restructured industry. Yet, even if a stay of the FCC's rules is granted, the provisions of the 1996 Act are specific enough to govern the development of competition. In that event competition can proceed, and competition will be followed by lower prices and a greater choice of services for customers. This fulfills the goals of the 1996 Act.

C. CONCLUSION

The IUB has demonstrated its entitlement to a stay based on the above. The IUB understands the FCC denied requests for stay to U S West Communications, Inc., GTE Service Corporation, and Southern New England

Telephone Company on September 17, 1996. The IUB intends to file a motion for stay with the Eighth Circuit Court of Appeals on Thursday, September 19, 1996.

Respectfully submitted,

William H. Smith/RAD

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September 18, 1996

CERTIFICATE OF SERVICE

Pursuant to Rule 15 of the Federal Rules of Appellate Procedure, I hereby certify that I have served the foregoing document upon the Respondents by making service on the following parties admitted to participate in the subject proceeding before the agency.

William Kinard
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Dated at Des Moines, Iowa, this 18th day of September, 1996.

Richard A. Drom